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# The Status and Protection of Unlawful Combatants

## 1. Introduction

The term ‘unlawful combatant’ became better known during the recent armed conflict in Afghanistan, when the Bush administration announced its decision to classify the captured Taliban soldiers and al-Qaeda fighters as unlawful combatants and, as a consequence, to deny them prisoner-of-war status.<sup>1</sup> This has provoked a heated debate over the exact status and protection of such persons. In view of the current security situation around the world, it has been asserted ever more frequently that unlawful combatants are not entitled to any protection whatsoever under international humanitarian law. These statements are clouded in emotional rhetoric and are also dangerous, as they lead to a situation where certain persons in armed conflict are left in a legal vacuum. Yet every person has the fundamental and undeniable right to recognition before the law. It is the general principle of the four Geneva Conventions (1949)<sup>2</sup> and their two Additional Protocols (1977)<sup>3</sup> that every person in enemy hands must have some status under international law — that of either a prisoner of war or a civilian. There is no intermediate status: nobody in enemy hands can be outside the law.<sup>4</sup> The present article will not discuss whether unlawful combatants should be treated as prisoners of war according to the Third Convention but, instead, will first shed some light on the status of unlawful combatants and then argue that they are protected as civilians under the Fourth Convention.

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<sup>1</sup> See White House Fact Sheet. Status of Detainees at Guantánamo. Available at: <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (31.08.2005) for further information. The United States has still promised ‘to treat all of the individuals detained at Guantánamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949’.

<sup>2</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. – 75 United Nations Treaty Series 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. – 75 United Nations Treaty Series 85; Geneva Convention relative to the Treatment of Prisoners of War. – 75 United Nations Treaty Series 135 (hereinafter ‘the Third Convention’); Geneva Convention relative to the Protection of Civilian Persons in Time of War. – 75 United Nations Treaty Series 247 (hereinafter ‘the Fourth Convention’).

<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). – 1125 United Nations Treaty Series 3 (hereinafter ‘the First Protocol’); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). – 1125 United Nations Treaty Series 609 (hereinafter ‘the Second Protocol’).

<sup>4</sup> J.S. Pictet (ed.). Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War. International Committee of the Red Cross: Geneva 1958, p. 51.

## 2. Status of unlawful combatants

Unlawful combatants do not fit into the traditional categorisation of persons in armed conflict. International humanitarian law is constructed on the understanding that all persons in armed conflict can be divided into two opposite categories: combatants and civilians. In defining these categories, the First Protocol has adopted a so-called ‘negative approach’, which should ensure that each person in armed conflict belongs to one category or another; i.e., there are no uncertainties, and no-one is left out. After first defining who combatants are<sup>5</sup>, the First Protocol explains that all persons who are not combatants are then inevitably civilians.<sup>6</sup> If there are doubts whether a person is a combatant or a civilian, that person must be considered to be a civilian. Such an approach is not only justified but also demanded by the fact that ‘the concepts of the civilian population and of the armed forces are only conceived in opposition to each other’.<sup>7</sup>

Before taking a closer look at the status of unlawful combatants, it is necessary to speak briefly about combatants and civilians, as this aids in understanding how unlawful combatants differ from other persons in armed conflict. The conditions for combatant status can be derived from Article 4 of the Third Convention and Article 43 of the First Protocol, which elaborated upon the earlier article. Generally speaking, combatants are members of armed forces as well as members of militias or volunteer corps forming part of such armed forces.<sup>8</sup> In addition, members of other militias and volunteer corps, including those of organised resistance movements, belonging to a party to the armed conflict can also have combatant status if they (1) are commanded by a person responsible for his subordinates, (2) have a fixed distinctive sign recognisable at a distance, (3) carry arms openly, and (4) conduct their operations in accordance with the laws and customs of war.<sup>9</sup> The defining feature of combatant status is the right to participate directly in hostilities; i.e., combatants have ‘a licence to kill or wound enemy combatants and destroy other enemy military objectives’.<sup>10</sup> They may even cause incidental civilian casualties and damage (collateral damage) under certain circumstances. Due to their status, combatants are entitled to combat immunity, which means that they may not be prosecuted for taking part in hostilities and for lawful acts of war. Such immunity is valid even if their behaviour (for example, intentional killing of another human being) would constitute a serious crime in peacetime. However, combat immunity is limited and does not extend to acts that transgress the rules of international law applicable in situations of armed conflict. When combatants are captured, they are entitled to prisoner-of-war status and to benefit from the protection of the Third Convention. Violations of international law applicable to armed conflict themselves do not deprive combatants of their right to be prisoners of war, except in certain limited cases.<sup>11</sup> Even if this happens, these persons are given protection equivalent in all respects to those accorded to prisoners of war.<sup>12</sup>

In contrast to combatants, civilians may not take part in hostilities, except in the relatively rare event of a *levée en masse*, where inhabitants of a non-occupied territory on the approach of the enemy spontaneously take up arms to resist the invading forces. If the population rises spontaneously, there is no need to be organised or to wear emblems, although they are required to carry arms openly and to respect the laws of war. The resisting civilians should not be treated as marauders or criminals, for all they have done has been to spring to the defence of their country.<sup>13</sup> Once captured, such inhabitants become prisoners of war.<sup>14</sup> Due to the prohibition to take part in hostilities, civilians enjoy general protection against dangers arising from military operations.<sup>15</sup> The belligerents must, accordingly, at all times distinguish between civilians and combatants and direct their operations only against military objectives.<sup>16</sup> If civilians, nevertheless, choose to take direct part in hostilities, they remain civilians but become lawful targets of attacks for as long as they do so. Civilians are entitled to the protection provided in the Fourth Convention.

<sup>5</sup> Article 43 of the First Protocol.

<sup>6</sup> Article 50 (1) of the First Protocol.

<sup>7</sup> Y. Sandoz, C. Swinarski, B. Zimmermann. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. International Committee of the Red Cross: Geneva 1987, p. 610.

<sup>8</sup> Article 4 (A) (1) of the Third Convention.

<sup>9</sup> Article 4 (A) (2) of the Third Convention.

<sup>10</sup> Inter-American Commission on Human Rights, Report on Terrorism and Human Rights. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (22.10.2002), para. 68.

<sup>11</sup> According to Article 44 (2)–(4) of the First Protocol, combatants forfeit their right to be prisoners of war if they fail to carry their arms openly during each military engagement and at such time as they are visible to the adversary while they are engaged in a military deployment preceding the launching of an attack in which they are to participate.

<sup>12</sup> Article 44 (4) of the First Protocol.

<sup>13</sup> I. Detter. The Law of War, second edition. Cambridge University Press: Cambridge 2000, p. 140.

<sup>14</sup> Article 4 (A) (6) of the Third Convention.

<sup>15</sup> Article 51 (1) of the First Protocol.

<sup>16</sup> Article 48 of the First Protocol.

The idea that there are only two categories of persons in armed conflict has always faced definitional challenges. Terms such as ‘illegal combatants’, ‘unprivileged combatants’, and ‘unlawful combatants’ have been around for as long as there have been laws governing the conduct of hostilities.<sup>\*17</sup> The usage and meaning of these terms have always depended on historical developments, but the idea behind them has never been very clear. There appear to be no international treaties actually providing a basis for these definitions.<sup>\*18</sup> One has to keep in mind that the concept of unlawful combatants is relevant only in international armed conflicts, because the law applicable to non-international armed conflicts does not foresee combatant status (thus, the issue of unlawful combatants does not arise).<sup>\*19</sup>

In brief, unlawful combatants are either combatants who fail to follow the laws of war or civilians who take part directly<sup>\*20</sup> in hostilities without being entitled to do so. It is most often the case that unlawful combatants disregard, in order to gain military advantage, the fundamental requirement that combatants distinguish themselves from civilians. Classic examples would be spies and saboteurs who, wearing civilian clothing, infiltrate enemy territory to collect information or to destroy designated objects. In the recent war in Iraq, the Fedayeen fighters dressed in civilian clothing and used civilians as human shields to protect themselves from attack. Another more recent, but also more alarming, form of unlawful combatants is civilians who have organised themselves as self-styled paramilitary fighters (not belonging to a party to the armed conflict). The best known real-life examples would be al-Qaeda fighters who were not incorporated in Taliban military units as part of the Taliban armed forces according to Article 4 (A) (2) of the Third Convention (at least there is no evidence of such incorporation).<sup>\*21</sup> A person is not allowed to wear two hats simultaneously: that of a civilian and the helmet of a soldier. Therefore, a person who engages in military raids by night while purporting to be an innocent civilian by day is neither a combatant nor a civilian.<sup>\*22</sup> Such a person is a legitimate military target, but, once captured, an unlawful combatant is not entitled to prisoner-of-war status. Before the adoption of the Geneva Conventions, international law permitted armies to deal harshly with unlawful combatants, even allowing them to be shot after capture.<sup>\*23</sup>

The status of persons captured on the battlefield is not always clear. Whenever there are doubts whether persons, having committed a belligerent act and having fallen into the hands of the enemy, are indeed combatants or instead unlawful combatants, such persons enjoy the protection of the Third Convention until such time as their status has been determined by a competent tribunal.<sup>\*24</sup> The latter does not have to be a military tribunal.<sup>\*25</sup> The matter of unlawful combatants is further complicated by the fact that they can be divided into two distinct categories on the basis of where they carry out their missions. Firstly, there are those who operate behind enemy lines in the enemy’s home territory or in the occupied territory (for example, and before all, spies and saboteurs). Secondly, there are those who operate directly in the battlefield, where the opposing parties are fighting one another (they can be called battlefield unlawful combatants). These are persons who take direct part in hostilities without being entitled to do so and pose a specific threat to the enemy as well as to civilians because they fail to meet one or more of the four conditions for combatant status, especially as regards ignoring the duty to distinguish themselves from civilians. Such division is not theoretical but very much practical, as it appears to have, according to some opinions, legal significance in determining the proper protection to be granted to relevant persons. It is the status and protection of battlefield unlawful combatants that is a matter of question and problematic. For this reason, the next section deals foremost with the protection of such unlawful combatants.

<sup>17</sup> See, generally, R.R. Baxter. So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs. – *British Yearbook of International Law* 1951 (28), p. 323.

<sup>18</sup> K. Dörman. The Legal Status of ‘Unlawful/Unprivileged Combatants’. – *International Review of the Red Cross* 2003 (85), p. 46.

<sup>19</sup> However, there is no rule that prohibits the government, during a non-international armed conflict, from according the member of dissident armed groups both combatant and attached prisoner-of-war status. Common Article 3 of all four Geneva Conventions, which applies specifically in non-international armed conflicts, recommends that the government and other parties to the non-international armed conflict conclude special agreements to apply all or part of the other provisions of the Geneva Conventions.

<sup>20</sup> See R.K. Goldman. *International Humanitarian Law: Americas Watch’s Experience in Monitoring Internal Armed Conflicts*. – *American University Journal of International Law and Policy* 1993 (9), pp. 62–72 for a detailed discussion of the distinction between direct and indirect participation in hostilities.

<sup>21</sup> G.H. Aldrich. The Taliban, al-Qaeda, and the Determination of Illegal Combatants. – *American Journal of International Law* 2002 (96), p. 893.

<sup>22</sup> Y. Dinstein. *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge University Press: Cambridge 2004, p. 29.

<sup>23</sup> J. Callen. Unlawful Combatants and the Geneva Conventions. – *Virginia Journal of International Law* 2004 (44), p. 1026.

<sup>24</sup> Article 5 (2) of the Third Convention.

<sup>25</sup> Indeed, the possibility that only a military tribunal may determine the status of a captured person was expressly left out of the final text of the Third Convention. See J.S. Pictet (ed.). *Commentary: III Geneva Convention relative to the Treatment of Prisoners of War*. International Committee of the Red Cross: Geneva 1960, p. 77.

### 3. Protection of unlawful combatants

If it is duly determined that the persons in question are not indeed lawful combatants and thus are not entitled to prisoner-of-war status, there remains a crucial question. Namely, are unlawful combatants entitled to some other form of protection under international humanitarian law, or are they completely excluded from the scope of its protection? If they are not protected by the Third Convention, then they are, logically, entitled to protection under the Fourth Convention. It may seem rather surprising that international humanitarian law should protect unlawful combatants. Those who take part in hostilities while not belonging to armed forces are acting deliberately outside the laws of war. Surely they know the dangers to which they expose themselves and therefore it would be simpler (one may say fairer even) to exclude them from the protection of international humanitarian law. However, the term 'unlawful combatant' has been used too lightly and applied to such trivial offences that it is not advisable to leave the accused at the mercy of those detaining them.

#### 3.1. Protected persons

The Fourth Convention was devised to protect persons who 'at the given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.<sup>26</sup> Although the definition of protected persons in the Fourth Convention seems all-embracing and appears to offer undoubted protection to unlawful combatants, such interpretation is subject to serious debates and controversy. By all means, it is true that the Fourth Convention does not cover all possible unlawful combatants, as Article 4 clearly limits its field of application in certain cases. It does not protect persons who are (1) nationals of the party or power in which hands they are, (2) nationals of a state not bound by that convention, (3) nationals of a neutral state in the territory of a belligerent state, and (4) nationals of a co-belligerent state with normal diplomatic representation in the state in whose hands they are.<sup>27</sup> Thus, Americans nationals fighting alongside al-Qaeda fighters in Afghanistan are not entitled to protection under the Fourth Convention if they fall into the hands of United States armed forces. However, the International Criminal Tribunal for the former Yugoslavia (ICTY) has developed a doctrine whereby individuals who have the nationality of their captors may still qualify as protected persons in situations where they may be assimilated with an enemy state.<sup>28</sup> Instead, relying on nationality, the tribunal's decision turned on the 'substantial relations' between the person and enemy state, taking into consideration such factors as ethnicity, allegiance, and other close bonds with the enemy state.<sup>29</sup> This would then mean that a person who does not meet the nationality criteria may be assimilated to enemy nationality for the purpose of protection under the Fourth Convention. For example, a British national residing a long time in Afghanistan and fighting there with al-Qaeda may be regarded as an Afghan national instead of British, and therefore a protected person. Finally, those persons who are protected by the other three Geneva Conventions are not simultaneously protected by the Fourth Convention.<sup>30</sup>

The mere fact that a person has unlawfully participated in hostilities does not mean that he automatically loses all protection under the Fourth Convention. Indeed, a contrarian approach would simply place such a person outside the law and reduce the meaning of the Fourth Convention significantly. The latter serves as a safety net protecting all captured persons who fail to qualify for protection under other three Geneva Conventions. There are several arguments in support of the view that unlawful combatants are protected persons under the Fourth Convention. Firstly, at the International Committee of the Red Cross (ICRC) Stockholm Conference (1948), where the draft convention were approved, many delegates expressed their concern that the definition adopted for protected persons covered also those who 'committed hostile acts without being members of the regular combatant forces'.<sup>31</sup> In other words, they understood that the approved definition included, among others, civilians unlawfully participating in hostilities.

Secondly, at the Geneva Diplomatic Conference, which adopted the convention in 1949, several delegations demanded certain exceptions for cases involving spies and saboteurs. The result of these demands was Article 5 of the Fourth Convention, which allows certain derogations from the protection of that convention but at the same time also supports the interpretation that the Fourth Convention covers unlawful combatants. Its paragraph 1 states that

<sup>26</sup> Article 4 (1) of the Fourth Convention.

<sup>27</sup> Article 4 (1)–(2) of the Fourth Convention.

<sup>28</sup> See *Prosecutor v. Delalic et al.*, Case IT-96-21-A, judgement of the Appeals Chamber, 20 February 2001, paras. 52–84 for a detailed discussion.

<sup>29</sup> *Ibid.*, paras. 82–83.

<sup>30</sup> Article 4 (4) of the Fourth Convention.

<sup>31</sup> J.S. Pictet (Note 4), p. 52.



‘[w]here in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the [Fourth] Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.’

That provision permits derogations in cases involving any person whose acts are hostile or prejudicial to the security of the concerned state. The referenced hostile and prejudicial activity most certainly means direct participation in hostilities, not merely a political attitude with respect to the enemy. Thus, paragraph 2 indicates that paragraph 1 considers unlawful combatants protected persons under the Fourth Convention.

Thirdly, Article 45 (3) of the First Protocol provides, again, further implicit confirmation that unlawful combatants are protected under the Fourth Convention. The provision states that

‘[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of [the First] Protocol.’

To what persons does this provision apply? In essence, it concerns any person who has taken part in hostilities but is not protected under the Third Convention as a prisoner of war or under the Fourth Convention as a civilian meeting the nationality criteria. The phrase ‘any person who has taken part in hostilities [...] who does not benefit from more favourable treatment in accordance with the Fourth Convention’ clearly has to mean that at least some unlawful combatants are protected under that convention. Otherwise, the very same phrase would be meaningless and unnecessary. In addition, the second sentence of Article 45 (3) provides that ‘in occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention’. This shows once more that unlawful combatants in occupied territories are covered by the Fourth Convention.

In addition, the commentary to Article 45 (3) asserts that ‘a person of enemy nationality who is not entitled to prisoner-of-war status is, in principle, a civilian protected by the Fourth Convention, so that there are no gaps in protection’.<sup>32</sup> But, at the same time, it also observes that things are not always so straightforward in armed conflicts; for example, adversaries can have the same nationality, which renders the application of the Fourth Convention impossible, and there can arise numerous difficulties regarding the application of that convention. Thus, as the Fourth Convention is a safety net to persons who do not qualify for protection under the other three Geneva Conventions, Article 45 (3) serves yet again as a safety net for those who do not benefit from more favourable treatment in accordance with the Fourth Convention.

The view that a person is, generally speaking, protected by either the Third Convention or the Fourth Convention is supported also by ICTY case law. The Trial Chamber said in the case *Prosecutor v. Delalić et al.* that it is important to note that there is no gap between the two.<sup>33</sup> If an individual is not entitled to the protections of the Third Convention as a prisoner of war, he necessarily falls within the ambit of the Fourth Convention, provided that its Article 4 nationality requirements are satisfied. The tribunal then added that it felt such an approach to be ‘a satisfactory solution — not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view’.<sup>34</sup> The latter is a very powerful argument, as the object and purpose of international humanitarian law is, generally speaking, to provide the widest possible protection to persons in armed conflict. The exclusion of certain persons from the scope of international humanitarian law and leaving them in a legal black hole definitely does not contribute to the achievement of that objective. On the contrary, such interpretation would open a door for uncertainties and abuses, such as those reported to occur at Guantánamo Naval Base.<sup>35</sup>

For the same reasons, it is most difficult to agree with claims that battlefield unlawful combatants who fought on the actual front line cannot be protected by the Fourth Convention simply because that convention does not contain special provisions applicable in the zone of military operations. It is true enough that the Fourth Convention provides different specific protections to (1) aliens in the territory of an enemy party to the conflict and (2) persons in occupied territory who are in the hands of the adverse party, but this does not, by any means, indicate that persons captured on the battlefield are again in a legally uncertain position (the general protections in Part II of the Fourth Convention are still applicable). Consequently, some authors assert that unlawful combatants are entitled to the specific protections of the Fourth Convention only if they

<sup>32</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (Note 7), p. 558.

<sup>33</sup> In reaching such a conclusion, the tribunal referred to Articles 43 and 50 and noticed that the terms ‘combatant’ and ‘civilian’ in these articles were defined as in opposition to each other — that is, using the ‘negative approach’ discussed above.

<sup>34</sup> See *Prosecutor v. Delalić et al.*, Case IT-96-21-T, judgement of the Trial Chamber, 16 November 1998, para. 271.

<sup>35</sup> See, for example, Human Rights Watch. *Guantánamo: Detainee Accounts*. Available at: <http://hrw.org/backgrounders/usa/gitmo1004/gitmo1004.pdf> (31.08.2005); Amnesty International. *Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power*. Available at: [http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/\\$File/AMR5106305.pdf](http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/$File/AMR5106305.pdf) (31.08.2005).

were operating in enemy or occupied territory at the time of their capture.<sup>\*36</sup> Such interpretation is flawed for a number of reasons. Most importantly, there is no intermediate area (buffer zone) between the territories of two adversarial parties to the armed conflict. If one party advances, the territory of another party then becomes occupied territory. The commentary to Article 6 of the Fourth Convention similarly explains that ‘there no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation’.<sup>\*37</sup> The relations between the civilian population of a territory and troops advancing into that territory, regardless of whether they are fighting, are governed by the Fourth Convention. Equally, if battlefield unlawful combatants cross the front line, then they are in either the occupied area or enemy territory and protected by the Fourth Convention.

At some point, the captured battlefield unlawful combatants must be removed from the battlefield to either occupied or enemy territory. Does that fact change the protections they are given? The normal reflex would possibly, and probably, be that the law applicable to the place where they are held should apply.<sup>\*38</sup> This is also the direction in which Article 4 of the Fourth Convention is pointing, as that convention protects person who ‘*at the given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power*’ (emphasis added). The fact that the captured battlefield unlawful combatants are to sooner or later receive full protection under the Fourth Convention renders the debate as to whether unlawful combatants captured on the battlefield are specifically protected by that convention essentially moot.

## 3.2. Substantial protections

### 3.2.1. Fourth convention

Unlawful combatants, as are all other persons of the countries in armed conflict, including persons otherwise excluded by Article 4<sup>\*39</sup>, are entitled to the general protections set forth in Part II of the Fourth Convention. Additional protections granted to unlawful combatants depend on their location:

- Part III, sections I, II, and IV, for persons in enemy territory;
- Part III, sections I, III, and IV, for person in occupied territory.

However, the protections in Part III are not absolute and can be derogated from under strict conditions as described in Article 5. Firstly, if a person in the enemy territory is definitely suspected of or engaged in activities hostile to the security of the state, the person is not entitled to rights and privileges as would be prejudicial to the security of said state.<sup>\*40</sup> Here is one of the article’s weak points, as it is very difficult to specify the acts previously mentioned. The clause cannot refer to a political attitude toward the state, so long as that attitude is not translated into action.<sup>\*41</sup> The rights referred to are not very extensive in the case of protected persons under detention. They consist essentially of the right to correspond, right to receive individual or collective relief, right to spiritual assistance from ministers of their faith, and right to receive visits from the representatives of both the protecting power and the International Committee of the Red Cross.<sup>\*42</sup> The security of the state cannot possibly be a justification for depriving such persons of protection under elementary provisions — for example, Article 38 stipulating that they should receive medical attention if their state of health so requires. Secondly, if a person in the occupied territory is detained as a spy or saboteur or as a person under definite suspicion of activity hostile to the security of the occupying power, he is regarded to have forfeited his rights of communication.<sup>\*43</sup> The application of that provision is strictly limited to cases of absolute military necessity (no such condition is attached to the first derogation) and rights of communication under the Fourth Convention.

<sup>36</sup> See, for example, R.R. Baxter (Note 17), p. 328 (‘unlawful belligerents in the zone of operations were not taken into account in connexion with [Articles 4 and 5]’); G.I.A.D. Draper. The Status of Combatants and the Question of Guerrilla Warfare. – British Yearbook of International Law 1971 (45), p. 197 (‘if [unlawful combatants] were operating in neither type of territory, their position is far from clear and their protection is speculative’); J. Callen (Note 23), p. 1039 (‘the limitations expressed in [paragraphs 1 and 3 of Article 5 of the Fourth Convention] are thus directed towards unlawful combatants who fight behind enemy lines, in areas away from what might traditionally be called the battlefield’).

<sup>37</sup> J. S. Pictet (Note 4), p. 60.

<sup>38</sup> K. Dörman (Note 18), p. 63.

<sup>39</sup> J.S. Pictet (Note 4), p. 118.

<sup>40</sup> Article 5 (1) of the Fourth Convention. One should not attach much attention to the word ‘privileges’, as this is the only article in the convention that speaks about privileges in addition to rights. The rights of protected persons are their privileges, as such rights are not enjoyed by persons not protected by the Fourth Convention.

<sup>41</sup> *Ibid.*, p. 56.

<sup>42</sup> J.S. Pictet (Note 4), p. 56.

<sup>43</sup> Article 5 (2) of the Fourth Convention.

Even if all possible derogations have been appropriately used, unlawful combatants should nevertheless be treated with humanity and, in the event of trial, should not be deprived of the rights associated with a fair and regular trial. In occupied territory, a fair and regular trial is ensured by Articles 64 to 76. There are no special provisions regarding fair and regular trial as would be applicable in enemy territory. However, Common Article 3 to all four Geneva Conventions is definitely applicable, and it requires, at minimum, ‘a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples’. The derogation foreseen in paragraphs 1–2 of Article 5 are to be used reasonably, and the full rights of a protected person should be restored at the earliest date consistent with the security of the state or occupying power.<sup>\*44</sup>

### 3.2.2. Additional protection

It was mentioned above that any person who has taken part in hostilities but who is not entitled to prisoner-of-war status and does not benefit from more favourable treatment in accordance with the Fourth Convention is always protected under Article 75 of the First Protocol.<sup>\*45</sup> Differently from the mentioned convention, application of that article in regard to unlawful combatants does not depend on whether a particular person meets the nationality criteria in Article 4 of the Fourth Convention. In order to benefit from the protection of Article 75, a person must simply fulfil three conditions:

- 1) he must be in the power of a party to the armed conflict;
- 2) he must be affected by armed conflict or occupation; and
- 3) he must not benefit from more favourable treatment under the four Geneva Conventions or the First Protocol.

Article 75 demands that all persons in the power of a party to the armed conflict be treated humanely in all circumstances and that they enjoy the protections listed therein without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any criteria of a similar nature. The article contains a rather long list covering fundamental guarantees, which include numerous prohibited acts and accorded rights. It is important to point out here that all persons have extensive judicial guarantees. No sentence may be passed, and no penalty may be executed, against a person who has been found guilty of a penal offence related to the armed conflict except pursuant to a conviction that has been pronounced by an impartial and regularly constituted court that respects the generally recognised principles of regular judicial procedure.<sup>\*46</sup> The judicial guarantees in Article 75 (4) are especially important for unlawful combatants in enemy territory because, under the Fourth Convention, as briefly discussed above, such persons benefit only from the very general protections of Common Article 3. Even unlawful combatants in occupied territory get a few more judicial guarantees — for example, the presumption of innocence.

Article 75 both ensures that no person in the hands of a party to an armed conflict is excluded from the protection of international humanitarian law and expands the protection given under the Fourth Convention. This is especially relevant in the case of persons who are deprived of certain rights under Article 5 of the Fourth Convention. There can be no doubt that Article 75 constitutes a minimum standard that does not allow any exceptions.<sup>\*47</sup> Nowadays, Article 75 constitutes customary international law<sup>\*48</sup> and therefore is binding upon every state regardless of whether it is a party to the First Protocol or not.<sup>\*49</sup> The customary legal status of the central provisions of Article 75 is reinforced by the fact that its text addressing fundamental guarantees and penal prosecutions was drawn, *mutatis mutandis*, from the terms of Articles 4 and 6 of the Second Protocol, which in turn were based to a significant extent upon the corresponding provisions of the International Covenant on Civil and Political Rights.

<sup>44</sup> Article 5 (3) of the Fourth Convention.

<sup>45</sup> Article 45 (3) of the First Protocol.

<sup>46</sup> Article 75 (4) of the First Protocol. The paragraph itself includes a non-exhaustive list of fundamental judicial principles; for example, everyone should be informed without delay of the particulars of the offence alleged against him, everyone should have all necessary rights and means of defence, and no-one may be accused or convicted of a criminal offence on account of any act or omission that did not constitute a criminal offence under the national or international law to which he was subject at the time it was committed.

<sup>47</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (Note 7), p. 870.

<sup>48</sup> See, for example, G.H. Aldrich (Note 21), p. 893; Inter-American Commission on Human Rights (Note 10), para. 76; C. Greenwood. International Law and the “War on Terrorism”. – International Affairs 2002 (78), p. 316; R.K. Goldman, B.D. Tittmore. Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights under International Humanitarian and Human Rights Law. Available at: <http://www.asil.org/taskforce/goldman.pdf> (31.08.2005), p. 38.

<sup>49</sup> While the four Geneva Conventions have 192 parties (practically all existing states), the First Protocol has 163 parties, excluding such states as Afghanistan, Iran, Iraq, Israel, Pakistan, Sudan, Turkey, and the United States (data correct as of 24 August 2005). These numbers, but especially the selected names of non-parties, clearly show that the fact that Article 75 is always applicable as customary international law does make a difference.

Although the Fourth Convention and Article 75 have spelled out more or less detailed guarantees granted unlawful combatants, it is still worth mentioning that they benefit also from Common Article 3, which is called a ‘mini convention’ and constitutes a sort of summary of law in the very complex field of judicial guarantees. Although that article is designed to be applied particularly in non-international armed conflicts, it is actually relevant to all forms of armed conflict and in regard of all persons, irrespective of their status.<sup>50</sup> It is probably unnecessary to add that Common Article 3 has the undoubted status of customary international law and thus is, again, binding upon all states.

## 4. Conclusion

Before the ongoing ‘war on terror’, most people had never heard of ‘unlawful combatant’. But the term has since been used frequently in different contexts without there being a clear and uniform understanding of its substance and significance. The typical view is that unlawful combatants are simply terrorists who are not entitled to any protection under international humanitarian law. There is some truth in such a view, as the most troubling form of unlawful fighters at the moment is civilians organising themselves as self-styled paramilitary fighters, such as al-Qaeda militants. They are unlawful combatants because they are not entitled to participate directly in hostilities and when doing that they disregard, in order to gain military advantage, the fundamental requirement that fighters distinguish themselves from civilians.

For these reasons, unlawful combatants are not entitled to prisoner-of-war status when captured. But, contrary to what is widely claimed, this does not mean that they are completely outside the protection of international humanitarian law. The present article has demonstrated that unlawful combatants who meet the nationality criteria qualify as civilians under the Fourth Convention and therefore are entitled to the protection formulated therein. This is the only possible solution, as there is no third category of persons besides combatants and civilians. The mere fact that a person has illegally participated in hostilities is not a criterion for excluding application of the Fourth Convention, although it may give reason for derogating from certain rights in accordance with Article 5 thereof. The specific protection under the Fourth Convention depends not on the place where unlawful combatants were captured but on the situation in which such persons find themselves in enemy hands. The protection is most extensive in occupied territory, although the law applicable in enemy territory is also well developed. Article 75 of the First Protocol provides further guarantees, which constitute a minimum standard with no exceptions allowed. All unlawful combatants, regardless of their nationality, where they were captured, and whether they are covered by the Fourth Convention, are entitled to the guarantees of Article 75 at all times. Even if the Fourth Convention or the First Convention should leave some loopholes or uncertainties, Common Article 3 applies to all persons and regardless of whether a non-international or international armed conflict is involved.

<sup>50</sup> *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 102; *Prosecutor v. Delalić et al.* (Note 28), para. 150; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits. – ICJ Reports 14 (1986), para. 218.